it or had it in his possession or under his control for a lawful object, be guilty of felony, and, on conviction, shall be liable to imprisonment for a term not exceeding fourteen years, and the explosive substance shall be forfeited."

On appeal the Court of Appeal held that the indictment was in fact bad as alleged, but nevertheless applied the proviso and dismissed the appeal. In doing so the court referred to *R. v. Thompson*[4]:—

"One of the objects of section 4 was to prevent the quashing of a conviction upon a mere technicality which had caused no embarrassment or prejudice. Whilst giving the right of appeal upon any wrong decision of any question of law, the object of the legislature was that justice should be done in spite of a wrong decision, and that the court should not interfere if it came to the conclusion that, notwithstanding the wrong decision, there had been no substantial miscarriage of justice. The court must always proceed with caution when it is of opinion that a wrong view of the law has been taken by the judge presiding at the trial, but when it is apparent, and, indeed, undisputed, as it is and must be in this case, that no embarrassment or prejudice had in fact been suffered in consequence of the pleader having made the manifest error above mentioned, the court must act upon the proviso in this section of the Act."

I would therefore rely on section 448 of the Criminal Procedure Code which says:—

"448. Subject to the provisions hereinbefore contained no finding, sentence or order passed or made by a court of competent jurisdiction shall be reversed or altered on account of:—

(a) any error, omission or irregularity in the complaint, summons, warrant, charge, judgment or other proceedings before or during trial or in any inquiry or other proceedings under this Code;

.....

unless such error, omission, improper admission or rejection of evidence, irregularity, want or misdirection has occasioned a failure of justice."

I cannot see any failure of justice in this case and having regard to section 448 uphold the finding of the trial magistrate despite the omission to specify the words "with intent to deceive." As I have already stated it is not necessary to specify this intent in the indictment.

Ground (4) of the appeal is also dealt with in the case of *R. v. Greenberg.*[1] In this case, as I have indicated, the inferences which the trial magistrate drew from the facts are quite justified. It is clear that the appellant was concerned in a conspiracy for the purpose of cheating the intended buyer of the car. I feel certain that PW.3 would have gone to report the loss of his car to the police and have it seized back from the purchaser who will be left to look for the seller, Beh Hock Chai. The discrepancies can clearly be found in the evidence of the defence. The appellant said:—

"On that day about 11 a.m. Dollah and I were in coffee shop at Simpang Tiga Tasek Glugor. Ah Yong was also with us. Soon after one Tan Ah Poh drove his car to that coffee shop."

DW.2 said he met the accused at Tasek Glugor. A Chinese came and delivered the car. He was Ah Yong. Ah Yong (DW.3) said:—

"On that day I was waiting in coffee shop at Tasek Glugor. I met accused and Dollah at that coffee shop. I saw Ah Poh hand the car to Dollah. The ignition key was handed to Dollah."

The trial magistrate may conclude that when PW.3 said he had authorised his brother to sell the car it is a little strange that PW.3 went on to say—,

"On 6.12.68 about 10 a.m. my older brother drove the motor car to Bukit Mertajam. I don't know the reason why he came to Bukit Mertajam."

From the possession of this false registration card for which no explanation has been given, I accept the trial magistrate's finding of fact that PW.1 found this registration card (P.1) in the pocket of the appellant, and I agree with the trial magistrate who quite rightly rejected the suggestion that this evidence was fabricated by PW.1 for the purpose of convicting the appellant. It is clear that the unknown Beh Hock Chai would have signed the purported transfer of this car, received some money and disappeared.

Far too many cars have disappeared in this part of the country and an investigation could have been made to check what sort of insurance cover this owner had, whether it covered loss by theft.

I take a serious view of offences of this sort and I am considering whether I should enhance the sentence on the appellant. The offence is punishable, on conviction, with a term not exceeding twelve months or to a fine not exceeding two thousand dollars or both such imprisonment and fine. This is an offence which has little to be said in extenuation and I consider that the only sentence for this sort of offence is a term of imprisonment. Accordingly I set aside the fine of $250 and I substitute therefor a term of imprisonment for six months.

Appeal dismissed. Sentence enhanced.

THE "HOE LEE" OWNERS OF CARGO EX "KUALA KANGSAR" v. OWNERS OF "HOE LEE"

[O.C.J. (Wee Chong Jin C.J.) September 4, 1969]

[Singapore — Admiralty Suit No. 62 of 1969]

Practice and Procedure — Admiralty suit in rem — Affidavit to lead warrant of arrest — Defective — Whether curable under R.S.C. 1934 O. LXIII — Admiralty Procedure Rules, r. 16(1)(a).

Practice and Procedure — Name, description and place of abode of plaintiff — Admiralty suit in rem — R.S.C. 1934 O. II r. 4.

Shipping — Arrest of ship — Affidavit to lead warrant of arrest — Defect in: Whether curable under R.S.C. 1934 O. LXIII.

Practice and Procedure — Security negotiated out of court — Whether court has power to order return of.

The defendants in this suit sought to set aside the writ of summons in an admiralty action *in rem* and all subsequent proceedings (including the warrant of arrest) on the following grounds: (1) that the writ did not comply with R.S.C. 1934, O. II r. 4, in that the name and description and place of abode of the plaintiffs were omitted therefrom; (2) that the writ did not comply with Admiralty Procedure Rule 9(1) in that the words "and other persons interested in" did not appear after the name of the defendant in the title to the writ; (3) that the affidavit to lead the warrant was defective in that it did not comply with Admiralty Procedure Rule 16(1)(a) by reason of not stating the nature of the plaintiffs' claim therein. They also asked for an order that the security furnished by them (by way of bankers' guarantee) to procure the release of their vessel be returned to them or their solicitors for cancellation.

The substantial questions the court had to consider were: (a) whether in an admiralty suit *in rem*, the name, description and place of abode of the plaintiff should be stated in the writ of summons as required by O. II r. 4; and (b) whether or not the defect in the affidavit filed on behalf of the plaintiffs to lead the warrant of arrest of the vessel "Hoe Lee", was such that the warrant of arrest must be set aside. The only defect in the affidavit was that it did not state the nature of the plaintiffs' claim, and it appeared that the reason for this was that he had relied on a publication which had inaccurately set out the contents of rule 16(1) of the Admiralty Procedure Rules. The nature of the claim was however stated in the endorsement on the writ which was served with the warrant. Prior to the filing of the motion, the plaintiffs filed a supplementary affidavit repeating the indorsement on the writ.

Held: (1) the provisions of R.S.C. O. II r. 4 did not apply to admiralty proceedings *in rem:* and accordingly, the names, descriptions and places of abode of plaintiffs and defendants need not be specified in admiralty actions *in rem*;

(2) the words "other persons interested in" need not appear after the name of the defendant, and the writ was in proper form in that it was addressed to the owners and other persons interested; accordingly, the writ would not be set aside.

(3) the requirements set out in rule 16(1) of the Admiralty Procedure Rules were mandatory and accordingly the Registrar, under that rule, had no power to issue a warrant for the arrest of property at the instance of a plaintiff or a defendant in an admiralty action *in rem* unless an affidavit had been filed which complied with all the provisions of rule 16(1). In this case the warrant of arrest ought never to have been issued by the Registrar because he was empowered only to issue it if "the nature of the claim" was stated in the affidavit of the plaintiffs or their agent;

(4) the curing provisions of R.S.C. O. LXIII are applicable to all the provisions of the Admiralty Procedure Rules, but the requirements of rule 16 (1) of the Admiralty Procedure Rules are mandatory requirements and the omission to state the nature of the claim in the affidavit was such as to make the warrant of arrest a nullity and not an irregularity; in the present case it was an all-important and essential requirement of the issue of the warrant of arrest that the plaintiffs or their agent had filed an affidavit which stated, *inter alia*, the nature of the plaintiffs' claim in the action. There had thus been a fundamental failure to comply with the requirements of rule 16(1) relating to the issue of the warrant of arrest and this fundamental failure made the warrant of arrest much more than an irregularity and made it a nullity. Therefore the warrant of arrest must be set aside;

(5) the security the defendants gave to the plaintiffs was a matter negotiated out of court by the parties and so the court had no power to order the plaintiffs to return to the defendants "the security furnished by the defendants to procure the release of the said vessel for cancellation". If no mutually acceptable solution could be arrived at between the parties out of court, that security must then be the subject matter of proceedings independent of the present application before the court;

(6) the defendants having only partially succeeded on the motion, they should have only ¾ of their costs.

Cases referred to:—

(1) *The "O. Sambaur" (No. 1); Winmore Corporation Ltd. v. The Owner of L.S.T. "O. Sambaur"* [1958] M.L.J. 85.

(2) *In re Pritchard decd.* [1963] 1 Ch. 502.

The following were also cited in argument:— Victoria Machinery Ltd. v. the Canada and the Triumph (1913) 18 British Columbia Reports (Canada) 511; *Fry v. Moore* (1889) 23 Q.B.D. 395.

MOTION.

K.A. O'Connor for the plaintiffs.

A.P. Godwin for the defendants.

Cur. Adv. Vult.

Wee Chong Jin C.J.: This is a motion by the defendants, the owners of the vessel "Hoe Lee", that the Writ of Summons in an Admiralty action *in rem* and all subsequent proceedings (including the warrant of arrest) be set aside on the following grounds:—

1. The writ does not comply with Order II rule 4 of the Rules of Supreme Court, 1934, in that the name and description and place of abode of the plaintiffs are omitted therefrom.
2. The writ does not comply with Admiralty Procedure Rule 9(1) in that it is not addressed to the owners of and other persons interested in the "Hoe Lee".
3. The affidavit to lead the warrant is defective in that it does not comply with Admiralty Procedure Rule 16(1)(a) by reason of not stating the nature of the plaintiffs' claim herein.

The defendants also ask for an order that the security furnished by them to procure the release of their vessel be returned to them or their solicitors for cancellation.

The facts are these. An admiralty writ *in rem* was issued on the 29th April 1969 at the instance of the plaintiffs against the defendants, the owners of the vessel "Hoe Lee". The writ was addressed to "The owners of and other persons interested in the vessel 'Hoe Lee' of the port of Singapore". The plaintiffs' claim as endorsed in the writ was "for damages for

breach of contract and/or duty and/or negligence by reasons of the loss and damage suffered by the plaintiffs in respect of goods shipped on board the 'Hoe Lee' and transhipped at Singapore to the 'Kuala Kangsar' which capsized in or near the port of Singapore on 19th March, 1969".

On 25th July 1969, at the instance of the plaintiffs the Registrar issued a warrant for the arrest of the vessel "Hoe Lee". In support of the application for a warrant of arrest, an affidavit by a partner of the firm of solicitors acting as solicitors for the plaintiffs was filed stating the names and descriptions of the parties at whose instance the warrant was to be issued and that their claims had not been satisfied. The affidavit did not state the nature of their claims. The writ of summons and the warrant were duly served on the same day i.e. 25th July 1969, and thereupon the vessel was under arrest.

The vessel "Hoe Lee" was released on 29th July 1969 by the Registrar at the request of the plaintiffs the defendants having by an out of court arrangement with the plaintiffs given a banker's guarantee (the terms of which are unknown to the court) to the plaintiffs. On 30th July 1969 the defendant's solicitors entered a conditional appearance to the writ.

On 5th August 1969 the defendants' solicitors filed a motion to set aside the writ and the warrant of arrest. At the hearing of the motion counsel for the defendants eventually abandoned ground 2 and also conceded that even if he were right on ground 1, it was an irregularity which could and ought to be cured under the provisions of Order LXIII of the Rules of the Supreme Court which reads as follows:—

> "Non-compliance with any of the provisions of these rules, or with any rule of practice for the time being in force, shall not render any proceedings void, unless the court or a judge so directs, but such proceedings may be set aside, either wholly or in part, as irregular, or amended, or otherwise dealt with, in such manner and upon such terms as the court or a judge thinks fit."

The first question I have to consider is whether in an admiralty suit *in rem*, the name, description and place of abode of the plaintiff should be stated in the writ of summons as required by Order II rule 4 of the Rules of the Supreme Court.

Counsel of the defendants contends that by virtue of rule 8 of the Admiralty Procedure Rules, every Admiralty suit is governed by the Admiralty Procedure Rules and subject to those rules, by the Rules of the Supreme Court and that accordingly Order II rule 4 of the latter rules must be complied with.

Rule 8 of the Admiralty Procedure Rules provides as follows:—

> "8. Subject to the provisions of these Rules every Admiralty suit, whether *in rem* or *in personam*, shall be commenced by writ of summons and dealt with, heard and determined in conformity with the provisions of the Civil Procedure Ordinance as if such suit was an ordinary civil suit respecting a sum exceeding $500."

Order II rule 4 of the Rules of the Supreme Court provides as follows:—

> "The writ shall be prepared by the plaintiff or his solicitor, and shall specify the name, description, and place of abode of the plaintiff and of the defendant, so far as can be ascertained, and shall be indorsed with a statement of the claim made, and of relief or remedy required in the action."

Counsel for the plaintiffs submits however that rule 8 of the Admiralty Procedure Rules, in particular the words "subject to the provisions of these Rules", clearly lays down that an express provision in those Rules must prevail over any provisions in the Rules of the Supreme Court. He submits that rule 30 of the Admiralty Procedure Rules expressly provides that "the forms in force in the Admiralty Division of the High Court in England shall be followed subject to such variations and alterations as may be necessary," and the relevant English form for an admiralty action *in rem* does not require that the plaintiffs be named or that their places of abode be given. In support of his submission he cites the following passage in *British Shipping Laws*, Volume I Admiralty Practice para. 156:—

> "This practice, which existed in the High Court of Admiralty before the Judicature Acts, 1873 to 1875, also permits several plaintiffs to sue collectively; thus, for example, the master and crew of a ship often sue for lost effects, usually on the same writ as the owners, also without being named. In salvage actions plaintiffs usually sue on one writ as 'The Owners, Master and crew of the [steam-tug or as may be] "X".' In short, plaintiffs may be described without being named.
>
> "The practice is often of particular value in case of damage to cargo which may consist of parcels belonging to hundreds of plaintiffs. It has been in no way altered by the Judicature Acts or the Rules of the Supreme Court. There is, however, nothing to prevent plaintiffs being named and some practitioners consider that it is preferable to do so."

It is unnecessary for me to decide the extremely difficult question whether rule 30 of the Admiralty Procedure Rules is such an express provision as to oust the provisions of Order II rule 4 of the Rules of the Supreme Court but having regard to the fact that the practice of not naming the plaintiffs in Admiralty actions has existed before 1873 and the particular value, where there are innumerable plaintiffs, of not having to name the plaintiffs, I would hold, though with some hesitation, that the provisions of Order II rule 4 of the Rules of the Supreme Court do not apply to Admiralty proceedings.

The more substantial question before me is whether or not the affidavit filed by the plaintiffs' solicitors in support of his application to the Registrar for the issue of a warrant of arrest of the vessel "Hoe Lee", and which affidavit did not state the nature of the plaintiffs' claim, was so defective that the warrant of arrest must be set aside.

It is not in dispute that the affidavit was defective and counsel for the defendants submits that the defect was such that the Registrar had no power or jurisdiction to issue the warrant for the arrest of the defendants' vessel. The relevant rule is rule 16 of the Admiralty Procedure Rules the material provisions of which are as follows:—

"16.—(1) In a suit *in rem* a warrant for the arrest of property may be issued by the Registrar at the instance either of the plaintiff or the defendant at any time after the issue of the writ of summons, but no warrant of arrest shall be issued until an affidavit by the party or his agent has been filed and the following provisions complied with:—

(a) The affidavit shall state the name and description of the party at whose instance the warrant is to be issued, the nature of the claim or counterclaim, the name and nature of the property to be arrested, and that the claim or counterclaim has not been satisfied.

(2) The judge may in any case if he thinks fit to allow the warrant to issue, although the affidavit may not contain all the required particular, ..."

In my judgment the requirements set out in rule 16(1) are mandatory and accordingly the Registrar, under rule 16(1), has no power to issue a warrant for the arrest of property at the instance of a plaintiff or a defendant in an Admiralty action *in rem* unless an affidavit has been filed which complies with the provisions of rule 16(1). The warrant of arrest in the present case ought never to have been issued by the Registrar because he was empowered only to issue it if "the nature of the claim" is stated in the affidavit of the plaintiffs or their agent.

It is submitted for the plaintiffs that in the present case the Registrar can be said to have issued the warrant in exercise of the discretion conferred on him ("Judge" includes Registrar under the Rules of the Supreme Court) by rule 16(2). That submission I reject as there is an affidavit filed by the same deponent on behalf of the plaintiffs that the failure to state the nature of the plaintiffs' claim in the affidavit filed at the instance of the plaintiffs in support of the application for the issue of a warrant of arrest was because he had relied on a publication which had inaccurately set out the contents of rule 16(1). It is therefore clear beyond doubt that the Registrar was never asked to and did not act under rule 16(2).

Alternatively, counsel for the plaintiffs submits that the failure to comply with the requirements of rule 16(1) does not render the warrant of arrest a nullity but merely amounts to an irregularity which could and ought to, in all the circumstances, be cured under the provisions of Order LXIII of the Rules of the Supreme Court.

It is not in dispute that the curing provisions of Order LXIII are applicable to all the provisions of the Admiralty Procedure Rules (see *The "O. Sambaur" (No. 1); Winmore Corporation Ltd.* v. *The Owner of L.S.T. "O. Sambaur"*[1]) but it seems to me that the requirements of rule 16(1) are mandatory requirements and the omission to state the nature of the claim in the affidavit is such as to make the warrant of arrest a nullity and not an irregularity,

The distinction between a nullity which could not be cured by Order LXIII and an irregularity which could be cured has been exhaustively discussed in *In re Pritchard decd.*[2] In that case Upjohn L.J. (as he then was) said at pages 523-524:—

"I do not think that the earlier cases or the later dicta upon them prevent me from saying that, in my judgment, the law when properly understood is that Ord. 70 applies to all defects in procedure unless it can be said that the defect is fundamental to the proceedings. A fundamental defect will make it a nullity. The court should not readily treat a defect as fundamental and so a nullity, and should be anxious to bring the matter within the umbrella of Ord. 70 when justice can be done as a matter of discretion, still bearing in mind that many cases must be decided in favour of the party entitled to complain of the defect *ex debito justitiae*. Lord Denning in *MacFoy* pointed out that a useful test was whether the defect could be waived. I agree with that as a good common-sense test, but I also agree with Mr. Rubin that it cannot be a completely legal test, for until you have decided whether the proceeding is a nullity, you cannot decide whether it is capable of waiver.

The authorities do establish one or two classes of nullity such as the following. There may be others, though for my part I would be reluctant to see much extension of the classes. (i) Proceedings which ought to have been served but have never come to the notice of the defendant at all ..... (ii) Proceedings which have never started at all owing to some fundamental defect in issuing the proceedings. (iii) Proceedings which appear to be duly issued but fail to comply with a statutory requirement."

In the present case it is an all-important and essential requirement of the issue of the warrant of arrest that the plaintiffs or their agent has filed an affidavit which states, *inter alia*, the nature of the plaintiffs' claim in the action. There has thus been a fundamental failure to comply with the requirements of rule 16(1) relating to the issue of the warrant of arrest and this fundamental failure makes the warrant of arrest much more than an irregularity and makes it a nullity.

Accordingly, I must make an order setting aside the warrant of arrest but it does not follow that I ought to make any order in respect of the security the defendants have given to the plaintiffs. As I have earlier mentioned this security was a matter negotiated out of court by the parties and so it seems to me that I have no power to order the plaintiffs to return to the defendants "the security furnished by the defendants to procure the release of the said vessel for cancellation." In my view if no mutually acceptable solution can be arrived at between the parties out of court, this "security", the terms of which are not before me, must then be the subject matter of proceedings independent of the present application before me.

Warrant of arrest set aside.

Solicitors: *Drew & Napier; Donaldson & Burkinshaw.*

PUBLIC PROSECUTOR v. KARNAL SINGH

[R.Cr.J. (Ong Hock Sim J.) August 16, 1969]
[Penang — Criminal Revision No. 13 of 1969]

Criminal Law and Procedure — Case which ought to be tried by High Court — Causing hurt with sulphuric acid — Corrosive and Explosive Substances and Offensive Weapons Ordinance, 1958, s. 4 — Penal Code, s. 326 — Criminal Procedure Code (Cap. 21), s. 188.

In this case the respondent had been acquitted by the Sessions Court on a charge under section 4 of the Corrosive and Explosive Substances and Offensive Weapons Ordinance, 1958.

Held: the charge in this case should have been laid under section 326 of the Penal Code and therefore the trial was a nullity and an order would be made that the accused be recharged and a preliminary inquiry held with a view to his committal for trial in the High Court.

Cases referred to:—

(1) *Public Prosecutor* v. *Lim Kheng Peng* unreported (Penang — Criminal Appeal No. 11 of 1969).

(2) *Public Prosecutor* v. *Lee Hor Sai* [1969] 1 M.L.J. 168.

CRIMINAL REVISION.

Abu Mansor bin Ali (Deputy Public Prosecutor) for the Public Prosecutor.

Ong Hock Sim J.: In this case, due to the fact that the learned President, Sessions Court, Penang, overlooked two previous decisions by this court, the respondent was acquitted on the following charge:—

"That you jointly charged with another person still at large, on 16.11.67 at about 2.30 a.m. at N.E.B. Office, Patani Road, Butterworth, in the State of Penang, did unlawfully and maliciously use corrosive substance, to wit, sulphuric acid, for the purpose of causing hurt to one Joginder Singh s/o Mehman Singh, and that you have thereby committed an offence punishable under section 4 of the Corrosive and Explosive Substances and Offensive Weapons Ordinance No. 43/58."

The first decision I refer to is *Public Prosecutor v. Lim Kheng Peng*[1] where I varied the sentence of binding over for two years in the sum of $1,000 under section 290 of the Criminal Procedure Code to one of one year's imprisonment and six strokes of the rotan when the respondent was convicted on a charge under section 4 of the Corrosive and Explosive Substances and Offensive Weapons Ordinance, 1958, and I had occasion then to say:—

"It is lucky for him the legal department failed to distinguish, to look and examine to see whether this was a proper case for a charge under section 326 or under section 4 of the Corrosive and Explosive Substances and Offensive Weapons Ordinance.'

In that case, the respondent threw nitric acid on the face of his wife but the evidence was inconclusive although she said that these burns were all over her forehead, nose, cheeks and chin as borne out by the medical report, in which event the case is one of "grievous hurt" as defined in section 320 of the Penal Code. The other case is *Public Prosecutor v. Lee Hor Sai*,[2] where the victim, a girl, had been slashed with a knife on her face some three or four times and the respondent was convicted by the learned magistrate under section 324 of the Penal Code. In exercise of my powers of revision, I set aside the conviction there and directed that the respondent be charged under section 326 of the Penal Code, as medical evidence showed that the girl had permanent disfiguration of the face, and further ordered that a preliminary enquiry be held with a view to committing the respondent for trial in the High Court.

In this present case, the medical evidence was a little flimsy and slipshod. It does not appear to indicate just what should be the proper charge but the exhibit is very clear. The medical report says:

"On examination he had healed scars or keloid, on the face, neck, upper chest and (L) forearm.

Scars over (R) side of both chin and neck caused constractures with distortion of mouth and limiting movements of head."

I had occasion to see this victim. His mouth was hanging open and loose.

With two counsel there to assist the court, one for the accused and the other counsel on a watching brief for the victim, it is a little surprising that the case should have gone on and be concluded on a charge under section 4 of the Corrosive and Explosive Substances and Offensive Weapons Ordinance when it is clear that it was a proper case for trial under section 326 of the Penal Code. There is provision in section 188(2) of the Criminal Procedure Code for the learned president here to take appropriate action in directing the matter to be sent to the magistrate's court with a view to committal for trial